Supreme Court, U.S.
FILED
MAR 8 1996
CLERK

No. 95-1256

In The

Supreme Court of the United States

October Term, 1995

BERNARD J. DOLENZ, M.D.,

Petitioner,

v.

SOUTHWEST MEDIA CORPORATION and GLENNA WHITLEY,

Respondents.

On Petition For Writ Of Certiorari To The Texas Supreme Court And The Fifth Court Of Appeals

BRIEF IN OPPOSITION FOR RESPONDENTS SOUTHWEST MEDIA CORPORATION AND GLENNA WHITLEY

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39 pp

COUNTERSTATEMENT OF QUESTIONS PRESENTED

This Court lacks jurisdiction to grant a writ of certiorari because the Dallas court of appeals' opinion is based upon an independent and adequate state ground.

(In response to Petitioner's Questions 1-8)

The court of appeals properly affirmed the trial court's summary judgment on the ground that the Article as a whole is a fair, true, and impartial account of judicial or official proceedings and is therefore privileged under Section 72.003 of the Texas Civil Practice and Remedies Code.

(In response to Petitioner's Questions 2, 3 and 6)

The court of appeals properly concluded that: (i) the Article is a substantially true account of various judicial and official proceedings against Petitioner; (ii) any alleged variances are of secondary importance and would not cause an ordinary reader to attach any greater opprobrium to Petitioner's conduct; and (iii) any alleged variances do not create a genuine issue of material fact.

(In response to Petitioner's Questions 2, 3 and 6)

The court of appeals properly affirmed the trial court's summary judgment on the alternative ground that Petitioner is a limited purpose public figure for the subject matter of the Article and neither Ms. Whitley nor Southwest Media acted with malice.

(In response to Petitioner's Questions 1 and 8)

Petitioner improperly seeks certiorari review of alleged errors of the trial court that were not addressed by the court of appeals in affirming the summary judgment.

(In response to Petitioner's Questions 3, 4, 5 and 7)

LIST OF ALL PARTIES TO THE PROCEEDING

Petitioner: (Appellant is an attorney representing himself)	Bernard J. Dolenz, M.D. 6102 Swiss Avenue Dallas, Texas 75214
Respondents: (Appellees in the court of appeals, defendants and counter-plaintiffs in the trial court)	Southwest Media Corporation formerly located at: 3988 North Central Expressway Suite 1200 Dallas, Texas 75204 Glenna Whitley 8303 San Fernando Way Dallas, Texas 75218
Counsel for Respondents:	Donald C. Templin Michelle E. McCoy Haynes and Boone, L.L.P. 3100 NationsBank Plaza 901 Main Street Dallas, Texas 75202-3789

Pursuant to Supreme Court Rule 29.6, Respondent Southwest Media Corporation is a subsidiary of American Express Publishing, Inc., which is a subsidiary of American Express Corporation. Southwest Media Corporation does not have any nonwholly-owned subsidiaries.

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TO THE HONORABLE SUPREME COURT OF THE UNITED STATES:

Respondents Southwest Media Corporation ("Southwest Media") and Glenna Whitley ("Ms. Whitley") (collectively "Respondents") respectfully request that this Court deny the Petition for Writ of Certiorari filed by Petitioner Bernard J. Dolenz, M.D. ("Petitioner" or "Mr. Dolenz").

I.

OPINIONS BELOW

This is a libel case. Petitioner filed this lawsuit against Respondents, claiming that Respondents libeled him through Southwest Media's publishing, in the April 1992 issue of *D Magazine*, an article written by Ms. Whitley entitled "The Art of the Con" (the "Article"). Petitioner complained of forty-seven statements in the Article that he claimed were defamatory. The trial court granted summary judgment in favor of Respondents on all of Petitioner's claims, without specifying a basis for its ruling.

The court of appeals affirmed the summary judgment on the ground that the Article as a whole was a "fair, true, and impartial account of judicial or official proceedings" and is therefore privileged under Section 72.003 of the Texas Civil Practice and Remedies Code. As an alternative holding, the court held that Petitioner is a limited purpose public figure and that neither Southwest Media nor Ms. Whitley acted with malice.

Mr. Dolenz filed an application for writ of error seeking review by the Texas Supreme Court. On October 19, 1995, the Texas Supreme Court refused to exercise its

discretionary jurisdiction and denied Mr. Dolenz's application with the notation "writ denied."[1]

II.

RESPONSE TO PETITIONER'S STATEMENT OF JURISDICTION AND OBJECTIONS TO JURISDICTION OF THIS COURT TO GRANT A WRIT OF CERTIORARI IN THIS CASE

A. Mr. Dolenz has failed to allege a proper basis for jurisdiction.

Mr. Dolenz purports to invoke this Court's jurisdiction under 28 U.S.C. § 1254, which provides that "[c]ases in the courts of appeals may be reviewed by [this Court] . . . by writ of certiorari. . . . " *See* 28 U.S.C. § 1254(1). Section 1254 of Title 28, however, "governs the routing of cases from the *federal* courts of appeals to the U.S. Supreme Court." *See* Commentary on 1988 Revision to 28 U.S.C. § 1254 (emphasis added); *see also* Stern, Gressman and Shapiro, *Supreme Court Practice* (6th ed.) (hereafter *Supreme Court Practice)* at § 2.1.

All proceedings in this case were conducted in Texas state courts. As a result, if this Court has jurisdiction to grant a writ of certiorari in this case, it would be under *section 1257* of Title 28, which provides for this Courts' discretionary review of final judgments or decrees "rendered by the *highest court of a State* in which a decision could be had." 28 U.S.C. § 1257(a) (emphasis added); *see also* Commentary on 1988 Revision to 28 U.S.C. § 1257

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[1] The docket notation "writ denied" signifies that the Texas Supreme Court is of the opinion that the application presents no error of law which requires reversal or which is of such importance to the jurisprudence of the state as to require correction. *See* Tex. R. App. P. 133(a).

(section 1257 "governs the routing of cases from the *highest state courts* to the U.S. Supreme Court.") (emphasis added); *Supreme Court Practice* at § 3.1. Mr. Dolenz has failed to allege a proper statutory basis for this Court to grant a writ of certiorari.

B. Mr. Dolenz cannot establish this Court's jurisdiction to grant a writ of certiorari because the judgment of the Texas appellate court is based on state law grounds.

Mr. Dolenz's petition for a writ of certiorari faces another fundamental – and fatal – jurisdictional flaw.

Because the Texas Supreme Court denied discretionary review of this case, the Dallas court of appeals' opinion is the proper focus for this Court in determining whether review by certiorari is proper. The Dallas court of appeals affirmed the trial court's summary judgment on the ground that the Article as a whole is a fair, true and impartial account of judicial or official proceedings, and the Article is therefore privileged under section 73.002 of the Texas Civil Practice and Remedies Code. (App. 10)

1. The Dallas court of appeals' decision is based on state law.

Supreme Court Rule 10, which establishes "considerations governing review on certiorari," speaks in terms of cases in which "a state court . . . *has decided* an important question of federal law. . . . " Sup. Ct. R. 10 (emphasis added). Likewise, this Court's Rule 14.1(g)(i) imposes upon Mr. Dolenz the burden to include in his statement of the case a "specification of the stage in the proceedings . . . when the federal questions sought to be reviewed were raised; the method or manner of raising

them *and the way in which they were passed on by those courts. . . . "* Sup. Ct. R. 14.1(g)(i) (emphasis added).

Mr. Dolenz did not – and cannot – meet this burden for a very simple reason: the Dallas court of appeals' decision was based on state law grounds; specifically, section 73.002 of the Texas Civil Practice and Remedies Code. Mr. Dolenz does mention on page 1 of his petition for writ of certiorari the instances in which he brought First Amendment case law to the *trial court's* attention, *see* Petition at 1; however, as discussed below, the court of appeals decided this case based solely on a Texas statute.

2. Section 73.002 of the Texas Civil Practice and Remedies Code is an "adequate and independent" state ground for the decision in this case.

Significantly, the Dallas court of appeals' opinion is based upon a Texas statute and Texas case law interpreting that statute. (App. at 7-10) Thus, it is clear from the face of the opinion sought to be reviewed that the Texas court's exclusive reliance on TEX. CIV. PRAC. & REM. CODE ANN. § 73.002 constitutes an adequate and independent state ground of decision, and, as a result, this Court lacks jurisdiction to grant a writ of certiorari in this case. *See generally Supreme Court Practice* at § 3.1 p. 107.

In a footnote at the end of its opinion, the Dallas court of appeals made an "alternative holding" that the trial court's summary judgment could be affirmed on the ground advanced by the concurring opinion; specifically, that Mr. Dolenz is a limited purpose public figure and neither Ms. Whitley nor Southwest Media acted with malice. (App 10 at n.1; *see also* concurring opinion at App. 12-16) The concurrence's citation of federal case law does not in and of itself make Mr. Dolenz's case into one over

which this Court has jurisdiction. And, more significantly, the court explicitly characterizes its adoption of the concurring opinion's reasoning as an "alternative" holding. (App. at 10 n.1)

Because the majority's reference to federal law is confined to an independent, alternative holding (indeed, federal law was not even discussed in the majority opinion), the "alternative holding" does not transform this case into one over which this Court has jurisdiction to grant a writ of certiorari. *See California v. Freeman*, 488 U.S. 1311, 1313-15 (1979) (noting that if this Court corrected a state court's view of federal laws in an "independent, alternative holding" and same result would be reached on remand by application of state laws, then this Court's review would amount to "nothing more than an advisory opinion.")

The Dallas court's opinion in this case "indicates clearly and expressly" (App. at 10 n.1) that the federal and state grounds are alternative holdings, and the state ground is adequate to support the judgment. *See Sochor v. Florida*, 504 U.S. 527, 533 (1992); *Michigan v. Long*, 463 U.S. 1032, 1041 (1983); *Fox Film Corp. v. Muller*, 296 U.S. 207, 210 (1935). As a result, this Court lacks jurisdiction.

3. Mr. Dolenz's jurisdictional defects are incurable.

Although 28 U.S.C. § 1653 provides for amendment of defective allegations of jurisdiction in the trial or appellate courts, the jurisdictional defects in this case are incurable. Simply stated, the Dallas court of appeals is the highest Texas court to render judgment in this case, and that court's judgment is based on an independent analysis of Texas law.

III.

STATUTES AND RULES INVOLVED

Only one statute is involved in this case. That statute is section 73.002 of the Texas Civil Practice and Remedies Code, and section 73.002 provides, in relevant part:

> (a) The publication by a newspaper or other periodical of a matter covered by this section is privileged and is not a ground for a libel action. This privilege does not extend to the republication of a matter if it is proved that the matter was republished with actual malice after it had ceased to be of public concern.
>
> (b) This section applies to:
>
> (1) a fair, true and impartial account of:
>
> (A) a judicial proceeding. . . .

TEX. CIV. PRAC. & REM. CODE § 73.002(a) and (b).

IV.

STATEMENT OF THE CASE

The Article is about a series of lawsuits involving Petitioner and Dmitri Vail ("Vail"), a famous Dallas portrait artist. Petitioner first represented Vail in a lawsuit against NCNB Texas National Bank, in which Vail claimed that NCNB had breached its fiduciary duty as trustee of Vail's late wife's trust by failing to maintain Vail's property. The remainder of their courtroom encounters were adversarial. Petitioner next represented his own daughter, Brenda Dolenz Lievrouw ("Lievrouw"), in a lawsuit in small claims court against Vail. Petitioner had obtained several promissory notes from Vail, collateralized by Vail's paintings and their copyrights. When Vail and Petitioner had a falling out, Petitioner assigned those notes to his daughter and, in the small claims

lawsuit, Lievrouw sought to be reimbursed for the moving van she had hired to remove Vail's paintings from his home and for release of the paintings to her.

Then, Lievrouw sued Vail in Dallas County District Court, seeking to collect the notes and recover Vail's paintings. As part of that lawsuit, Vail sued Petitioner, claiming, *inter alia*, that Petitioner had conspired with his daughter to deprive him of his paintings and had breached his fiduciary duty to Vail. First Vail and then, after his death, his estate claimed that Petitioner had defrauded Vail, had breached his fiduciary duty to Vail, was negligent, and had violated the Texas Deceptive Trade Practices Act by coercing Vail to sign a contingency fee agreement with Petitioner, a power of attorney in Petitioner's favor, and promissory notes payable to Petitioner.[2] Vail also sent a file to the Office of the General Counsel of the State Bar of Texas, complaining that Petitioner had committed legal malpractice. Based on that complaint, the State Bar of Texas filed a disciplinary petition against Petitioner. Petitioner was also involved in the probate proceeding of Vail's estate, where similar claims of breach of fiduciary duty, negligence, and violation of the Texas Deceptive Trade Practices Act were alleged against Petitioner. The summary judgment record meticulously matches the complained-of statements in the Article with court records, most of which were read by the author prior to publication of the Article.

In the Article, Petitioner is referred to as a "spectacularly prolific litigant." In fact, he has been a party to a large number of lawsuits: he has filed approximately 75

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[2] In that lawsuit, all of these allegations made by Vail against Petitioner were adjudged by the Court as true as a result of a Motion for Sanctions filed by Vail.

lawsuits in Tarrant County and approximately 40 lawsuits in Dallas County, in which he represented himself more often than not. In at least nine of these lawsuits, Petitioner sued for libel and slander, making claims against individuals and, in one instance a hospital that had terminated his staff privileges.

Petitioner voluntarily brought his relationship with Vail into the public arena by enthusiastically cooperating with a writer from *D Magazine* for a story about the lawsuit between Vail and NCNB. When Ms. Whitley began writing the Article about Petitioner and Vail, she reviewed the court records discussed above and others, deposition transcripts, and exhibits. She also interviewed over 30 persons, including Petitioner, with knowledge of various statements in the Article. She reported in the Article the allegations of Brenda Lievrouw and Petitioner, as well as those of Vail and his estate.

V.

REASONS FOR DENYING THE WRIT

A. The Article is a fair, true and impartial account of judicial or official proceedings.

1. The Article is privileged under Texas statutes.

a. The Article is a privileged account of judicial proceedings.

A fair, true and impartial account of judicial proceedings or official proceedings authorized by law is privileged and cannot be the basis of a libel action. TEX. CIV. PRAC. & REM. CODE ANN. § 73.002(b)(1)(A) (Vernon 1990). So long as a pleading is open to public inspection, a magazine can truthfully publish, without malice, any allegation contained in the pleading without fear of liability. *Langston v. Eagle Pub. Co.*, 719 S.W.2d 612, 624 (Tex.

App. – Waco 1986, writ ref'd n.r.e.). The protection granted extends not only to pleadings and testimony in judicial proceedings, but also to statements concerning those pleadings. *Wavell v. Caller-Times Pub. Co.*, 809 S.W.2d 633, 636 (Tex. App. – Corpus Christi 1991, writ denied). The application of privilege under this statute is a question of law for the court. *Fitzjarrald v. Panhandle Pub. Co.*, 149 Tex. 87, 97, 228 S.W.2d 499, 505 (1950).

Petitioner argues that the court of appeals failed to apply the proper standard for determining when the question of privilege under section 73.002 is a question of law. Petitioner is incorrect. The question of privilege is one of law "when the language used is unambiguous *or* when the facts and circumstances surrounding the defamation are undisputed." *Christy v. Stauffer Publications, Inc.*, 437 S.W.2d 814, 815 (Tex. 1969); *Fitzjarrald v. Panhandle Pub. Co.*, 149 Tex. 87, 97, 228 S.W.2d 499, 505 (1950); *Walker v. Globe-News Pub. Co.*, 395 S.W.2d 686, 688 (Tex. Civ. App. – Amarillo 1965, writ ref'd n.r.e.); *Root v. Republic National Bank*, 337 S.W.2d 709, 711-12 (Tex. Civ. App. – Dallas 1960, no writ) (emphasis added). That is precisely the standard applied by the court of appeals in this case. (App. at 10)

b. The Article is substantially true.

Under Texas law, the truth of a statement alleged to be libelous is a complete defense to the action. TEX. CIV. PRAC. & REM. CODE ANN. § 73.005 (Vernon 1990). Falsity is an element of a plaintiff's case; therefore, Petitioner had the burden of proving falsity. *Jackson's Industrial Supplies, Inc. v. Cochran*, 809 S.W.2d 802 (Tex. App. – Beaumont 1991, no writ); *A.H. Belo Corp. v. Rayzor*, 644 S.W.2d 71 (Tex. App. – Fort Worth 1982, writ ref'd n.r.e.).

The "substantial truth" of a statement is all that is required to constitute a complete defense; the statement need not be literally or mathematically true. *McIlvain v. Jacobs*, 794 S.W.2d 14 (Tex. 1990); *Gulf Construction Co. v. Mott*, 442 S.W.2d 778 (Tex. Civ. App. – Houston [14th Dist.] 1969, no writ). To determine whether a statement is substantially true, the court looks to the "gist" of a publication and decides whether the allegedly defamatory statement is more damaging to plaintiff's reputation, in the mind of the average listener, than a truthful statement would have been. *Langston v. Eagle Printing Co.*, 797 S.W.2d 66 (Tex. App. – Waco 1990, no writ); *see also Wavell v. Caller-Times Pub. Co.*, 809 S.W.2d 633, 636 (Tex. App. – Corpus Christi 1991, writ denied) ("It is not the function of the court to serve as senior editor to determine if the reporting is absolutely, literally true; substantial truth is sufficient.")

The question of substantial truth is one of law for the court where the underlying facts as to the gist of the defamatory charge are undisputed. The court can then disregard any variance with respect to items of secondary importance and determine the truth as a matter of law. *McIlvain*, 794 S.W.2d at 16; *see also Rogers v. Dallas Morning News, Inc.*, 889 S.W.2d 467 (Tex. App. – Dallas 1994, writ denied).

The Article is primarily an account of Petitioner's litigation involving Dmitri Vail, but also recounts other judicial proceedings that involved Petitioner. The writer has recounted the reports of lawyers, litigants, witnesses and observers, including Petitioner, who were connected with one or more of the multiple lawsuits. While Petitioner complains of statements in the Article that he characterizes as "defamatory," he makes no reference to

numerous statements therein that report favorably on his position.

In *Brady v. Cox Enterprises, Inc.*, 782 S.W.2d 272 (Tex. App. – Austin 1989, writ denied), the Austin court of appeals affirmed a summary judgment for libel defendants, holding that an article about a judge was privileged as a fair, true and impartial account of an official proceeding. The article republished complaints filed with the State Commission on Judicial Conduct and charges made in a filed mechanics' lien affidavit. The article also published the judge's denial of the claims. As a result, the court found that the newspaper had accurately reported the facts of the dispute. *Brady*, 782 S.W.2d at 275.

An article does not have to recount every allegation or every defense to be fair, true and impartial. No Texas case requires that a publication list all allegations or defenses or even an equivalent number for each party. Courts considering this privilege consider whether the account of the proceedings is substantially true; that is, did the article convey the gist of the proceedings? *Langston v. Eagle Printing Co.*, 797 S.W.2d 66 (Tex. App. – Waco 1990, no writ); *Walker v. Globe-News Pub. Co.*, 395 S.W.2d 686 (Tex. Civ. App. – Amarillo 1965, writ ref'd n.r.e.).

In *Walker*, the Amarillo court of appeals affirmed a publisher's summary judgment after finding that the articles in question contained a privileged account of pleadings, affidavits and depositions. The articles described the arrest of plaintiff Walker and his co-defendant, Hunter. Walker argued that the articles were not fair, true and impartial under the Texas statute because they implied that at least $25,000.00 in stolen merchandise was recovered from both Walker and Hunter when, in fact, most of the stolen property was recovered from Hunter, not Walker.

The court of appeals compared the articles with instruments on file to conclude that the trial court was correct in holding that the statements were substantially true. *Walker*, 395 S.W.2d at 689. The court held that the fact that the articles omitted testimony that most of the property was recovered from Hunter was not such a departure from the undisputed facts as to render the articles untrue or unfair. *Id.* at 689-690. If the law were otherwise, a magazine would never be able to publish an article about *Lievrouw v. Vail v. Dolenz*, as the litigation involved multiple parties, claims, cross-claims, attorneys, and over 150 pleadings in all.

Petitioner argues that three statements in the Article are not substantially true and, therefore, these statements are not an accurate account of the judicial proceedings. However, the evidence on which he relies is not part of the record in this case. The trial court sustained Respondents' objections to Petitioner's affidavit, the evidence on which Petitioner relies. (App. at 29) Petitioner did not complain on appeal of the trial court's sustaining Respondents' objections; thus, the evidence upon which Petitioner relies is not before the Court and should not be considered.

It is clear from the record that the gist or sting of each of these three statements is substantially true. First, the statement in the Article that "he began to threaten" a head nurse is based on a court pleading that states "it has been expressed that [Petitioner] displayed a manner which is abusive and threatening" to a head nurse. The gist or sting of the two statements is the same as a matter of law.

Second, the statement in the Article that Dmitri Vail was fined for filing an affidavit that was not properly notarized is substantially true. As is apparent from the

pleadings attached as summary judgment evidence, Vail was accused of not having his affidavit properly notarized and that was the basis for the court's ruling in that case. Therefore, as a matter of law, this statement is substantially true and falls within the privilege set forth in section 73.002 of the Texas Civil Practice and Remedies Code.

Finally, the statement that Ms. Virginia Brinkmann appeared *pro se* is also an accurate account of a judicial proceeding. Exhibit 23 to Defendants' Amended Motion for Summary Judgment shows that Ms. Brinkmann filed an answer *pro se*.[3]

The Article's account, as a whole, and the specific statements complained of, are substantially true. Many of the statements recount testimony or admissions from Petitioner himself. These accounts and allegations against Petitioner are accurately described. Neither Southwest Media nor Glenna Whitley were required to conduct an independent investigation to determine if the underlying allegations were true or false. *McIlvain v. Jacobs*, 794 S.W.2d 14 (Tex. 1990).

Not only did the Article accurately report the allegations against Petitioner, but many of the allegations were judicially determined to be true. For example, in *Lievrouw v. Vail v. Dolenz*, a sanctions motion against Petitioner was granted, his pleadings were stricken, and the facts contained in the operative pleading against him were deemed true. Thus, in the probate action *In re Estate of Dmitri Vail, Deceased*, the court noted that it had been

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[3] Additionally, neither of these last two statements is "of and concerning" Petitioner. As such, neither is defamatory of Petitioner as a matter of law. *Newspapers, Inc. v. Matthews*, 339 S.W.2d 890 (Tex. 1960).

deemed "conclusively established" that Petitioner had "solicited" Vail to retain Petitioner as his attorney of record at a time when Vail was "unable to make sound business judgments"; that Petitioner had "coerced" Vail into signing a contingency fee agreement, a power of attorney and several promissory notes; that Petitioner was "grossly negligent, fraudulent and acted with intentional, willful and heedless disregard for the rights of Vail." Petitioner may not agree with these findings, but the Article does accurately report them.

c. The Article is a fair comment on a matter of public concern.

Whether or not contained in court proceedings, a "reasonable and fair comment on or criticism of a matter of public concern, published for general information" is also privileged and cannot be the basis of any libel action. TEX. CIV. PRAC. & REM. CODE ANN. § 73.002(b)(2) (Vernon 1990).

Even those matters not directly contained in the various lawsuits, including *Lievrouw v. Vail v. Dolenz*, were matters of public concern, both in a legal and a literal sense. This Court has held that judicial proceedings associated with criminal matters are, without question, matters of legitimate public concern. *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 492 (1975). The Corpus Christi court of appeals held in *Wavell* that articles about various judicial proceedings, one criminal and two civil, were newsworthy as a matter of law. *Wavell v. Caller-Times Pub. Co.*, 809 S.W.2d 633, 636 (Tex. App. – Corpus Christi 1991, writ denied).

Petitioner argues that his relationship with Dmitri Vail is not a "matter of public concern published for general information" because no crime was involved in

any of the lawsuits in the Article. However, crimes, prosecutions, and judicial proceedings related thereto are not the *only* matters of public concern. For example, a lawsuit between two residents and exclusive town in the Dallas area, Highland Park, was found to be of public concern. *Newton v. Dallas Morning News*, 376 S.W.2d 396, 400 (Tex. Civ. App. – Dallas 1964, no writ). A radio broadcast of an editorial critiquing a movie was also found to be a matter of public concern. *Traweek v. Radio Brady, Inc.*, 441 S.W.2d 240, 243 (Tex. Civ. App. – Austin 1969, writ ref'd n.r.e.). Finally, a comment on the performance of a coach was a matter of public concern. *Conkwright v. Globe News Pub. Co.*, 398 S.W.2d 385, 386 (Tex. Civ. App. – Eastland 1965, no writ).

In *Hill v. Herald-Post Pub. Co.*, 877 S.W.2d 774 (Tex. App. – El Paso 1994), *aff'd in part and rev'd in part on other grounds*, 891 S.W.2d 638 (Tex. 1994), the court of appeals stated:

> Just the fact that the allegations had been made in a judicial proceeding would, under *Cox Broadcasting*, make it a matter of continuing public concern and interest. Like it or not, once allegations have been made in a judicial proceeding against a private person, he becomes much the same as a public figure such as an office holder, with the result that a newspaper can continue to republish those allegations so long as the account is fair, true and impartial.

877 S.W.2d at 780 & n.8.

In this case, Petitioner was not a private person but had become a limited purpose public figure. Therefore, the allegations made against him in various judicial proceedings were matters of public concern.

Additionally, the Article is a fair comment. Petitioner is quoted extensively throughout the Article. Even the

case cited by Petitioner in support of his argument holds that the common law privilege of fair comment applies if the disclosed facts are true or privileged. Petition at 16 (citing *Cianci v. New Times Pub. Co.*, 639 F.2d 54, 66 (2d Cir. 1980)). As is shown above, almost all of the statements Petitioner complained of are privileged. The remainder are not defamatory, are substantially true, or are opinions, and none were made with actual malice.

> To permit comment or criticism of a proceeding or act is necessarily to allow reasonable and fair latitude in such matter. It necessarily carries with it permission to draw from the facts any reasonable and fair inference or conclusion.
>
> * * *
>
> [T]he right of newspapers to make reasonable and fair comment and criticism upon matters of public concern for general information is at all times to be protected and never denied. Such comment or criticism, even when thoroughly justified, may of course be unpleasant to those involved. In this case, no doubt the publication, however justifiable, chafed and embarrassed defendant in error, but, if his conduct in such respect justified such comment or criticism, he has no just complaint.

Express Pub. Co. v. Keeran, 284 S.W. 913, 917 (Tex. Comm'n App. 1926). Here, the allegations that a physician and attorney took advantage of an aged, famous person as his patient and client likewise constitute newsworthy events of public concern.

2. Under the United States and Texas Constitutions, the press may publish the contents of court records without liability.

An accurate account of pleadings or proceedings in judicial actions is protected by the First and Fourteenth Amendments to the United States Constitution and by the Texas Constitution. *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 95 S. Ct. 1029, 43 L. Ed. 2d 328 (1975); *Wavell v. Caller-Times Pub. Co.*, 809 S.W.2d 633 (Tex. App. – Corpus Christi 1991, writ denied); *Langston v. Eagle Printing Co.*, 797 S.W.2d 66 (Tex. App. – Waco 1990, no writ).

> At the very least, the First and Fourteenth Amendments will not allow exposing the press to liability for truthfully publishing information released to the public in official court records. *Cox Broadcasting Corp. v. Cohn*, 95 S. Ct. 1029, 1047 (1975). To hold otherwise would . . . result in the suppression of news that should be available to the public. *Id.* at 1046.

Langston, 797 S.W.2d at 70.

The Article was developed from substantial amounts of information contained in court records. The First and Fourteenth Amendments and the Texas Constitution protect the publication of such information.

In *Wavell*, the court upheld summary judgment in favor of a newspaper that published a series of articles describing the charges and claims in various civil suits and criminal proceedings between Wavell (a lawyer) and his former lover. Wavell claimed that the newspaper's motive for publishing the articles was a libel action he had previously filed against the paper on behalf of a client. The court held:

> In its Motion for Summary Judgment, the defendant-appellees argued that the United States and Texas Constitutions prohibit civil damages

> against a newspaper for accurate and substantially true accounts of newsworthy matters arising from and pertaining to judicial proceedings. We agree.
>
> * * *
>
> The First Amendment protects the reporting of private facts where revealed in connection with newsworthy matters.

Wavell, 809 S.W.2d at 635, 636.

Petitioner cannot successfully argue that the charges made against him in these other court proceedings are false and that this creates a fact issue. Such is not Respondents' burden. The republication of those charges contained in court records is privileged. The truth of the underlying charges is not an issue. If it were, then the press would not enjoy the protection of the law while reporting on lawsuits, criminal charges, congressional hearings and all other matters which are vitally important to the freedom of speech and the free flow of information in this society. The court in *Wavell* specifically addressed this issue:

> The evidence, in the form of depositions, pleadings, trial transcripts and other documents associated with Covington's various judicial proceedings, shows that the articles published by *Caller-Times* are substantially true accounts of the judicial proceedings they concern. The article's reference to Wavell and the reporting of various facts surrounding Wavell's status as a victim of crime are newsworthy and of legitimate public interest. The articles identify to the reader that they are accounts of judicial proceedings and do not portray the statements reported as facts; rather the articles merely relate witness testimony and allegations of the parties.

> We hold that because the published articles are substantially true accounts of newsworthy events arising from open judicial proceedings, the First Amendment provides the *Caller-Times* immunity from liability for damages resulting from its publication of the articles.

Wavell, 809 S.W.2d at 636.

It is not even necessary that the journalist obtained the information directly from the court file or pleadings in order for it to be protected. In *Langston v. Eagle Printing Co.*, 797 S.W.2d 66 (Tex. App. – Waco 1990, no writ), the articles in question reported on a civil suit filed against the libel plaintiff by the Texas Attorney General. The author quoted an Assistant Attorney General, who had spoken with the reporter in an out-of-court statement, which that source then denied making. Noting that the statement was a substantially true account of the gist of the claims in the court action, the Court nevertheless granted summary judgment.

> The articles were substantially true accounts of pleadings available to the public. Accordingly, the First Amendment precludes attaching any liability to their publication and the Court correctly entered summary judgment on that ground.

Langston, 797 S.W.2d at 70.

In this case, the accusations in the Article – that Petitioner took advantage of an elderly client and abused his position as an attorney and a trustee – are taken straight out of several lawsuits which accuse him of that and more.

B. Petitioner is a limited purpose public figure, and neither Southwest Media nor Ms. Whitley acted with malice.

1. Petitioner is a public figure for the subject matter of the Article.

As an alternative basis for upholding the trial court's summary judgment, the court of appeals correctly held that Petitioner is a public figure for the purpose of the subject matter of the Article. The court of appeals' alternative holding is based upon controlling case authorities and Respondents offered competent summary judgment evidence that Petitioner thrust himself into the controversy concerning his relationship with Dmitri Vail. The subject matter of the article was indeed that very relationship and the controversy that arose from it. Petitioner invites a much too narrow interpretation of the limited public figure concept.

The most important factor in determining whether a person is a public figure is whether he has sought publicity on the topic being discussed. *See Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 345 (1974); *Durham v. Cannan Communications, Inc.*, 645 S.W.2d 845, 849-51 (Tex. App. – Amarillo 1982, writ dism'd w.o.j.). Petitioner had previously sought publicity and thrust himself and Dmitri Vail to the forefront of Vail's controversy with NCNB Texas, in an attempt to influence the outcome of that dispute. Specifically, Petitioner sought publicity regarding his representation of Dmitri Vail when he encouraged publication in *D Magazine* of an article written by Gary McDonald and published in March 1990.

> Those who, by reason of . . . the vigor and success with which they seek the public's attention, are properly classed as public figures . . . , may recover for injury to reputation only on

> clear and convincing proof that the defamatory falsehood was made with knowledge of its falsity or with reckless disregard for its truth.

Gertz, 418 U.S. at 342.

Petitioner cannot seek favorable publicity regarding the Vail lawsuit and his role therein and then disclaim his public figure status when the publicity turns adverse. Most public figures are such only for certain issues, such as here, the relationship between Petitioner and Dmitri Vail.

In *A.H. Belo Corp. v. Rayzor*, 644 S.W.2d 71 (Tex. App. – Fort Worth 1982, writ ref'd n.r.e.), the plaintiff became a "vortex public figure," as a member of a private development board for a state university by reason of his actions in voluntarily becoming involved in a controversy concerning the reasons for the resignation of a fellow board member and the termination of several university employees.

Litigation may trigger public figure status. Where a woman arrested for shoplifting filed suit against a department store, alleging racial discrimination, her subsequent libel suit against a broadcaster for falsely reporting an alleged prior arrest was decided against her on summary judgment. The plaintiff was held to be a public figure for this limited purpose. *Lewis v. McGraw-Hill Broadcasting Co.*, 832 P.2d 1118 (Colo. Ct. App. 1992); *see Maxwell v. Henry*, 815 F. Supp. 213, 215 (S.D. Tex. 1993) (plaintiff, arrested during a protest near an abortion clinic, was a limited purpose public figure for the purpose of a broadcast concerning public controversies and protests pertaining to abortion rights demonstrations on the eve of the Republican National Convention and the related investigations and proceedings to enforce the law).

The two cases cited by Petitioner in support of his claim that he is not a limited purpose public figure are distinguishable. *See* Petition at 6-7. In *Foster v. Laredo Newspapers, Inc.*, 541 S.W.2d 809 (Tex. 1976), *cert. denied*, 429 U.S. 1123, 97 S. Ct. 1160, 51 L. Ed. 2d 573 (1977), Foster was the elected county surveyor and had been hired by the County to perform specific projects. *Id.* at 810. The article involved a project that Foster had been hired, not elected, to perform. *Id.* at 813. Foster did not have any direct dealings with the public nor did he have any personal interest in the resolution of the problem that was the subject of the article. *Id.* at 814, 817. "Foster did not attempt to influence the outcome of the controversy through exposure of his personal opinions in the media." *Id.* at 817.

This is exactly what Petitioner did by giving his opinions to Gary McDonald. By placing himself into the middle of a controversy involving his representation of Dmitri Vail, Petitioner became a limited purpose public figure.

The other case cited by Petitioner is *Durham v. Cannan Communications, Inc.*, 645 S.W.2d 845 (Tex. App. – Amarillo 1982, writ dism'd w.o.j.). In *Durham*, an attorney sued a television broadcasting station, claiming he was defamed by a statement that he was connected with the infamous Chicken Ranch. *Id.* at 847. The court found that, although the attorney had achieved notoriety about matters he had handled as an attorney, he did not thrust himself to the forefront of the controversy involving the Chicken Ranch. *Id.* at 850-51.

As stated above, Petitioner did thrust himself and Dmitri Vail to the forefront of the very issue of the Article by "enthusiastically cooperating" with the author of a story about Dmitri Vail. In *Durham*, the court found that

the attorney might well be a limited purpose public figure for his activities as special counsel investigating the way county funds were being managed. *Id.* at 850, 851. In reaching this conclusion, the court discussed the fact that the attorney had talked with the press and answered questions about the investigation, just as Petitioner gave interviews to the author of the first article.

Petitioner claims that he is not a limited purpose public figure for the other lawsuits involving him and Dmitri Vail. However, Petitioner's definition of "topic" is too narrow. For example, in *Wavell v. Caller-Times Pub. Co.*, all of the judicial proceedings resulting from or connected with the assault of Wavell by his former lover were newsworthy. The articles recounted testimony and evidence concerning Wavell's former relationship with his lover, his lover's allegations of paternity against him, and Wavell's filing of a civil lawsuit against his former lover. *Wavell*, 809 S.W.2d at 635. Similarly, in *Maxwell*, because the plaintiff had participated in a protest of an abortion clinic, the court found that he had "thrust himself" to the forefront of that controversy. *Maxwell*, 815 F. Supp. at 215. The same is true in this case. Petitioner thrust both himself and Dmitri Vail into the limelight. Once that relationship was publicized by Petitioner, as in *Wavell*, he became a public figure for purposes of that relationship, as well as for other matters concerning that relationship. Petitioner was a limited purpose public figure with regard to his entire relationship with Dmitri Vail, not just for the NCNB lawsuit in which he represented Vail.

2. Respondents negated actual malice as a matter of law.

As to statements in the Article that are the subject of a qualified privilege, Petitioner must have established that such statements were untrue and were published with actual malice in order to sustain his claim for libel. "Actual malice" is defined as publishing a statement when the speaker knew it was false or with reckless disregard for its falsity. *New York Times v. Sullivan*, 376 U.S. 254, 84 S. Ct. 710, 11 L. Ed. 2d 686 (1964). "Reckless disregard" of falsity means publishing a statement when the speaker had a "high degree of awareness of probable falseness" and, in fact, entertained serious doubts as to the truth of the publication. *Carr v. Brasher*, 776 S.W.2d 567 (Tex. 1989), quoting *St. Amant v. Thompson*, 390 U.S. 727, 88 S. Ct. 1323, 20 L. Ed. 2d 262 (1968). Thus, "actual malice" is more than negligence; it is a subjective standard, based on the speaker's state of mind.

The Texas Supreme Court has held that summary judgment is appropriate where a libel defendant denies actual malice and the plaintiff fails to present competent evidence of actual malice. *Casso v. Brand*, 776 S.W.2d 551 (Tex. 1989); *see also Hill v. Herald-Post Pub. Co.*, 877 S.W.2d 774 (Tex. App. – El Paso 1994), *aff'd in part and rev'd in part on other grounds*, 891 S.W.2d 638 (Tex. 1994).[4]

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[4] Petitioner's characterization of the holding in *Casso v. Brand* is erroneous. In *Casso*, the Court held that federal case law applying federal procedural law does not require Texas courts in libel cases to disregard Texas summary judgment procedure. *Casso*, 776 S.W.2d at 556. The Court then affirmed a summary judgment pursuant to Texas procedural law for a defendant based on plaintiff's failure to establish actual malice. *Id.* at 559.

In *Hill*, the appellate court affirmed the trial court's summary judgment in favor of the defendants. The deposition of the author in *Hill* indicated that he tried to be as fair, accurate, and objective as possible in writing the articles at issue. *Hill*, 877 S.W.2d at 780-81. The assertions to the contrary made by plaintiff in his affidavit were "pure opinion" and would not overcome the deposition testimony of the author. *Id.*

This Article reported the allegations against Petitioner as they were made by the Vails and others. Ms. Whitley's affidavit states that she had no reason to doubt the truth of the statements in the Article, which statements recount the various charges and counter-charges, defenses and denials by Petitioner, as well as the results of other judicial proceedings. The affidavit of the Executive Editor of *D Magazine* also establishes that he had no reason to doubt the factual accuracy of the story.

To show actual malice, Petitioner must present admissible evidence that Respondents knew that the descriptions of the allegations were false or probably false. Actual malice requires "sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of the publication." *St. Amant v. Thompson*, 390 U.S. 727, 731, 88 S. Ct. 1323, 1325, 20 L. Ed. 2d 262, 267 (1968).

> It is not enough for the jury to disbelieve defendant's testimony. Rather, the plaintiff must offer clear and convincing affirmative proof to support a recovery. While it is conceivable that a defendant's trial testimony, under the rigors of cross-examination, could provide that requisite proof, it is more likely that plaintiff will have to secure that evidence elsewhere. If he cannot secure it during the discovery process, he is unlikely to stumble onto it at trial.

Casso, 776 S.W.2d at 558-59. The mere fact that Petitioner disputes some of those underlying allegations does not show malice on the part of Respondents. The content of the Article itself cannot be evidence of actual malice. *Gillum v. Republic Health Corp.*, 778 S.W.2d 558, 572-73 (Tex. App. – Dallas 1989, no writ) ("[M]alice cannot be inferred from the character of the allegedly defamatory statement without other evidence to prove it.")

As Respondents' objections to Petitioner's summary judgment evidence were sustained, the evidence to which Petitioner refers is not properly before the Court. Further, the apparent earlier draft of the Article with what seems like editor's questions to the author show care in publication – not malice. The court of appeals properly held, in the alternative, that Respondents' summary judgment evidence negated actual malice as a matter of law.

C. Even if this Court did have jurisdiction to grant a writ of certiorari, that jurisdiction would extend only to Mr. Dolenz's arguments that were actually addressed by the court of appeals.

Jurisdiction under section 1257 of Title 28 applies only to "[f]inal judgments or decrees *rendered* by the highest court of a State. . . . " 28 U.S.C. § 1257(a) (emphasis added). Mr. Dolenz raises several arguments in his petition that the Dallas court of appeals did not reach because resolution of those issues was not necessary to final disposition of the appeal. TEX. R. APP. P. 90(a). (App. at 10) Specifically, in his questions 3, 4, 5 and 7, Mr. Dolenz asserts that "[t]he trial court erred" in certain of its rulings. *See* Petition at i-ii.

If the Texas Supreme Court had found error in the Dallas court of appeals' decision, it would have reversed the judgment and remanded this case to the court of

appeals for consideration of the issues not addressed by that court. *See Hyundai Motor Co. v. Alvarado*, 892 S.W.2d 853, 855 (Tex. 1995); *Lewis v. Blake*, 876 S.W.2d 314, 316 (Tex. 1994). See also TEX. R. APP. P. 100(a) (only matters "determined" by court of appeals are properly raised in motion for rehearing). Likewise, this Court's review by certiorari does not encompass questions that were not addressed by the highest court of a state. 28 U.S.C. § 1257. Nevertheless, in an abundance of caution, the following paragraphs contain responsive arguments to the issues that the Dallas court of appeals did not address.

1. Opinions in the Article are not actionable.

Expressions of opinion are protected under the First Amendment to the United States Constitution and under the Texas Constitution. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339-40 (1974); TEX. CONST. art. 1, § 8; *Carr v. Brasher*, 776 S.W.2d 567 (Tex. 1989); *A.H. Belo Corp. v. Rayzor*, 644 S.W.2d 71 (Tex. App. – Fort Worth 1982, writ ref'd n.r.e.). This protection is only logical, as falsity is an element of libel, and pure opinions cannot be proven true or false. Only where an opinion implies the existence of false and defamatory facts can the plaintiff sustain a libel action. *Shearson Lehman Hutton, Inc. v. Tucker*, 806 S.W.2d 914 (Tex. App. – Corpus Christi 1991, writ dism'd w.o.j.). While there is no absolute First Amendment protection for all opinion, this Court makes it clear that opinions that do not imply false facts are nevertheless protected. *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 110 S. Ct. 2695, 111 L. Ed. 2d 1 (1990).

Petitioner has not pointed the Court to opinions in the Article that imply false and defamatory facts. To the extent that the author's opinions imply fraudulent or other improper conduct by Petitioner, the allegations of

such conduct are taken from court pleadings and are privileged (and were found by the court in *Lievrouw v. Vail v. Dolenz* to be true). The remainder of the opinions are hyperbole and are not meant to be taken literally. Such statements are not defamatory as a matter of law. *Yiamouyiannis v. Thompson*, 764 S.W.2d 338, 341 (Tex. App. – San Antonio 1988, writ denied), *cert. denied*, 493 U.S. 1021 (1990).

2. Certain statements in the Article are not defamatory as a matter of law.

Inherent within a libel action is the premise that the statement must be defamatory. A defamatory statement exposes a person to public hatred, contempt, ridicule, or financial injury, or impeaches his honesty, integrity, virtue or reputation. TEX. CIV. PRAC. & REM. CODE ANN. § 73.001 (Vernon 1990). A defamatory statement is false, abusive, unpleasant and objectionable to an individual. *Rawlins v. McKee*, 327 S.W.2d 633 (Tex. Civ. App. – Texarkana 1959, writ ref'd n.r.e.). The opinions of the parties or of the actual recipient have no bearing on whether the complained-of words are actually defamatory. *Id.* at 58; *Arant v. Jaffe*, 436 S.W.2d 169, 176 (Tex. Civ. App. – Dallas 1968, no writ). Rather, the statements must be defamatory in the mind of a reader of ordinary intelligence who has read the statement in light of the surrounding circumstances. *Musser v. Smith Protective Services, Inc.*, 723 S.W.2d 653, 655 (Tex. 1987). Only when the court determines the language to be ambiguous or of doubtful import should a jury be permitted to determine the statement's meaning and the effect of the statement on an ordinary reader. *Id.*

Petitioner argues that the Article, as a whole, is capable of defamatory meaning. However, Respondents

moved for summary judgment on the ground that certain of the statements were not defamatory as a matter of law. Petitioner's opinion of the statements and his objections to their content do not make the statements defamatory. The trial court considered the effect of the specific statements in light of the Article as a whole and the circumstances surrounding publication and found that the items could not be defamatory in the mind of a reader of ordinary intelligence as a matter of law.

3. The neutral reportage privilege protects the statements in the Article.

One of the bases for Respondents' summary judgment motion was that the neutral reportage privilege applies to the statements in the Article. This privilege protects "the accurate and dispassionate reporting of . . . charges, regardless of the reporter's private opinion regarding their validity." *Edwards v. National Audubon Soc'y*, 556 F.2d 113, 120 (2d Cir.), *cert. denied sub nom., Edwards v. New York Times Co.*, 434 U.S. 1002, 98 S. Ct. 647, 54 L. Ed. 2d 498 (1977). Because the Dallas court of appeals affirmed the trial court's summary judgment based on a Texas statute, it did not address whether the summary judgment was proper on the basis of the neutral reportage privilege. As a result, the Court need not consider Petitioner's contentions in this regard.

Charges made by a famous artist and others, including the State Bar of Texas, that an attorney took advantage of his attorney-client relationship are certainly serious charges. The reporting is neutral, as Petitioner is quoted extensively throughout the Article with his version of the story. Finally, the Article is an accurate account of the charges made by and against Petitioner. Therefore, the neutral reportage privilege provides an

additional basis supporting the summary judgment in Respondents' favor.

VI.

CONCLUSION

This Court lacks jurisdiction to grant a writ of certiorari because the Dallas court of appeals' judgment is based on an independent and adequate state ground. The court of appeals properly concluded that the trial court's summary judgment was supported under the theory that the Article as a whole was a "fair, true, and impartial account of judicial or official proceedings" and was privileged under state law. As an alternative holding, the court correctly concluded that Mr. Dolenz is a limited purpose public figure and neither Southwest Media nor Ms. Whitley acted with malice.

Respondents respectfully ask the Court to deny the Petition for Writ of Certiorari.

Respectfully submitted,

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